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No. 448

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

BROOKLYN SAVINGS BANK,

Petitioner,

vs.

WILLIAM J. O'NEIL

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

Opinions Below

The Municipal Court of the City of New York, Borough of Manhattan, First District, dismissed the complaint without opinion. The opinion of the Appellate Term (R. 59) is reported at 180 Misc. 542. The majority and dissenting opinions in the Appellate Division, First Department (R. 65-73), are reported at 267 App. Div. 317. The Court of Appeals of the State of New York wrote no opinion.

Jurisdiction

The Court of Appeals of the State of New York—which is the highest court of the State in which a decision in the

suit could be had—issued its remittitur on June 14, 1944 (R. 75). The order of the Municipal Court of the City of New York making the order of the Court of Appeals the order of the Municipal Court of the City of New York was entered on August 17, 1944 (R. 77). The final judgment of the Municipal Court of the City of New York was entered on the same day, August 17, 1944 (R. 78-80). Petition for writ of certiorari was filed September 8, 1944, and was granted November 6, 1944 (R. 83). The jurisdiction of this Court is invoked under section 237(b) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

Whether an employee has a right to statutory liquidated damages for non-payment of overtime under the Fair Labor Standards Act where, prior to either claim or suit therefor, the employer has voluntarily paid the full amount of such overtime and the employee has given a release of any such additional liability.

Statute Involved

Pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.*) are as follows:

> Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 16 (b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated; or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Statement

Subject to collective bargaining agreements (R. 7-8), the respondent here was employed as a night watchman at an eleven-story business building at 443 Fourth Avenue, New York City, from November 5, 1938, to August 30, 1940 (R. 13). Petitioner bank, located in Brooklyn (R. 7, 9), was the owner of the building (R. 3).

On June 1, 1942, this Court handed down its decision in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 519, holding that the federal wage and hour act applied to service employees at buildings the tenants of which "are principally engaged in the production of goods for interstate commerce." Respondent had left petitioner's employ nearly two years prior thereto (R. 13, 45). The building leases contained covenants against manufacturing (R. 44-45) which were

enforced (R. 43).[1] Nevertheless—because of the stringent penalties of the statute and the uncertainties and cost of litigation (R. 7-8)—petitioner voluntarily calculated respondent's overtime due if the Fair Labor Standards Act were applicable (which came to $423.16) and, without any demand whatever from respondent (R. 17), sought him out and tendered it to him (R. 15). Respondent, without protest (R. 17), accepted the overtime so calculated and in writing released petitioner "from any and all claims, debts, damages, or liabilities arising out of or in connection with his claims of any kind or character whatsoever growing out of his overtime employment" (R. 7-8, 42-3, 50).

Respondent then—without returning the amount so received in settlement (R. 4),[2] without protest to or demand upon petitioner (R. 17), and admitting that the amount of overtime had been correctly calculated in the settlement and fully paid (R. 4)—instituted action in the Municipal Court for the City of New York for the recovery of liquidated damages in an amount equal to the sum he had already been paid ($423.16) plus attorney's fees and interest from the time his employment ceased (R. 5). The trial court, after hearing the evidence, granted petitioner's motion to dismiss (R. 51). The Appellate Term reversed per curiam (R. 59, 56). The Appellate Division affirmed per curiam (R. 65-66), two justices dissenting (R. 66-73). The Court of Appeals affirmed without opinion (R. 75-76) and, upon its remittitur (R. 75-77), the Municipal Court made

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[1] The leases were introduced (R. 47) and show upon their face that they are the standard form of office lease (R. 43-44) long in use. It is a matter of common knowledge that union contracts specify different terms and conditions of employment in buildings where manufacturing is permitted. More stringent local health and safety regulations also apply to buildings where manufacturing is permitted.

[2] *Cf. Eclipse Bicycle Company* v. *Farrow*, 199 U. S. 581, 587; *United States* v. *Harvey Steel Co.*, 196 U. S. 310, 315-316; *Vance* v. *Chicago Portrait Co.*, 19 F. 2d 981, 986 (C. C. A. 7, 1927).

its order (R. 77) and entered the final judgment (R. 78-80).

In these proceedings there were involved both the coverage of the Act, as applied to the building in which respondent served as watchman,[3] and the effect of the voluntary payment and release. Petitioner did not, however, ask this Court to review the question of coverage because it regarded that issue not of general importance since it was essentially a fact question governed by the nature of the business conducted by tenants in a particular building during a limited period long past; but, since petitioner as a bank is the owner of business property, the validity of the voluntary payment and release was and is of general future importance to it and others similarly situated (Petition, p. 5). The remittitur of the court below (R. 76) certi-

[3] At the trial of the instant case respondent called several employees and one tenant who testified that nine of the twenty-seven tenants of the building (R. 46) dealt in goods which in some part came from outside the state or might be sent beyond the state (R. 18-50). Apart from the lack of qualification of such witnesses to testify as to the nature of the business (R. 19) and their failure to identify the period for which they spoke (R. 41) none of them testified that the tenants were engaged in any actual and substantial production for interstate commerce. There was thus insufficient evidence for coverage either as to goods received or goods sold. As to goods received, the statute applies only to "employees * * * engaged in commerce" rather than necessary to commerce; and the coverage sustained in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 574-575, is inapplicable because it involved a rate clerk of an interstate bus company. Compare *McLeod* v. *Threlkeld*, 319 U. S. 491. There was no evidence of special orders warranting the coverage sustained in the first two situations discussed in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 566-569, but the instant situation falls rather within the third situation there to the effect that "evidence of a wholly general character * * * lacks that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local distribution" (p. 570). *Cf. Higgins* v. *Carr Bros. Co.*, 317 U. S. 572, 574. As to sales, Section 13 (a) (2) of the Act expressly exempts from Section 7 "any employee in any retail establishment the greater part of whose selling * * * is in intrastate commerce." In order that respondent be covered by the Act it was necessary—and the case was tried on the theory (R. 18-50)—that he be engaged in an "occupation necessary to the production" (Section 3 (j)) "of goods for [interstate] commerce" (Section 7), as this Court held in the *Kirschbaum* case (pp. 524-525).

fies that there was presented to it the question of law which this Court is asked to review.

This Court granted certiorari to review the essential question presented (R. 83).

Specification of Errors to Be Urged

The Court of Appeals of the State of New York erred:

(1) In holding that the release of all further claims and damages under the Fair Labor Standards Act, freely executed by the employee and delivered to his employer at the time he received payment of all overtime compensation due him under the Act, is not a good defense to an action subsequently brought by such employee solely to recover liquidated damages.

(2) In refusing to permit compromise of the employee's claim for liquidated damages in direct conflict with prior decisions of this and other Courts sanctioning compromise of penalties, damages, or other liabilities under similar statutes.

(3) In holding that the liquidated damages as distinguished from overtime compensation is so affected with public interest that it may not be released by the employee.

(4) In holding that the employee may not evaluate for himself the damages suffered as a result of the delay in payment where full overtime compensation is paid.

(5) In failing to give effect to the well established policy of the law to encourage the amicable adjustment of disputes by arm's length negotiation where the statutory purposes have been fully accomplished.

(6) In permitting the respondent to repudiate the settlement and, while still retaining the benefits received thereunder, to institute suit for the recovery of an addi-

tional amount without risking the loss of the benefits derived from the settlement in the event that he fails to establish coverage.

Summary of Argument

Respondent employee received his full overtime without claim or litigation, freely and with full knowledge gave a complete release of all additional liability, but was nevertheless subsequently permitted to recover liquidated damages plus attorney's fees, interest, and costs. Such a result is contrary to law because—

(1) The statute does not outlaw such a release. It imposes liability for liquidated damages only for "unpaid" minimum wages or overtime; unlike other legislation of the same nature, it does not even specify when such compensation shall be paid; and the court below has therefore made delay of payment the condition of liability rather than failure of payment as specified in the statute. The statute contemplates liquidated damages only as an incident to suit for *unpaid* overtime or *unpaid* minimum wages and not litigation for such damages independently of compensation previously and voluntarily paid in full. The statute treats liquidated damages not as a part of the base liability but as secondary, personal, and remedial. Neither civil nor criminal enforcement provisions of the statute apply to unpaid damages.

(2) Upon general principle—at least in the absence of statutory prohibitions to the contrary—the federal courts permit all manner of voluntary settlements either with or without releases, sustain the release of workmen's wage claims, and allow the compromise of multiple damage liability. Congress, which must be presumed to have legislated with this general state of the law in mind, has rarely

provided otherwise by statute and even then only to a limited extent. Neither the legal nature, legislative design, nor public purpose of damage provisions requires them to be treated as so fixed and absolute that they may not be the subject of mutually voluntary adjustment or waiver.

(3) Even if despite uncertain coverage the statute may be constitutionally construed to prohibit in any circumstances settlements for less than 200% of the base liability, the canon of statutory construction requires no such harsh result here. It will make difficult both official enforcement and private adjustments, foster litigation, and be injurious to both employees and employers. The result reached by the court below was not intended by Congress and is both unnecessary upon the face of the statute and contrary to accepted ideas of good conduct.

Argument

The basic question here is whether the statute itself precludes, or may be construed to preclude, the extinguishment of double liability on the facts of this case. In its per curiam the Appellate Term said only that respondent "was employed in the production of goods for commerce within the meaning of the Fair Labor Standards Act" (R. 59) and the Appellate Division said only that (R. 65)—

> We appreciate that the result of our decision may seem harsh. The harshness, however, is inherent in the legislation and the decisions which have construed it.

The only full opinion written was that of the two dissenting justices in the Appellate Division sustaining petitioner's contentions (R. 66-73). Although they wrote no

majority opinions, each of the intermediate appellate courts granted leave to appeal (Appellate Term, R. 55; Appellate Division, R. 62).

The question here is therefore one solely of federal law.[4] The decisions of the circuit courts of appeals favor the validity of releases upon full voluntary payment of wages

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[4] Since the right claimed by petitioner arises upon federal statute, "the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected." *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245. The record and decisions below show that this was the sole issue and sole ground of decision. The rule requiring conformity with state law does not apply "where the Constitution, treaties, or statutes of the United States otherwise require or provide" (1 Stat. 73, 92; 28 U. S. C. § 725) or "in matters governed by the Federal Constitution or by Acts of Congress." *Erie Railroad* v. *Tompkins*, 304 U. S. 64, 77, 78. Where the right or claim arises upon federal law, the remedial details required to be supplied by judicial implication require in each instance the fashioning of a rule which is "ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of" the state in which the matter is presented. *Board of Comm'rs* v. *United States*, 308 U. S. 343, 349-350; *Deitrick* v. *Greaney*, 309 U. S. 190, 200-201; *Helvering* v. *Leonard*, 310 U. S. 80, 85-86; *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 468; *Note*, 54 Harv. L. Rev. 663, 665 n. 16. This Court has been careful to say, in requiring conformity with state law, that the cases, though brought in federal courts, are not there because the substance is created by federal law but because of the accident of diversity of citizenship. *West* v. *A. T. & T. Co.*, 311 U. S. 223, 231; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, 467; *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 540; *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496; *Griffin* v. *McCoach*, 313 U. S. 498, 503.

It may be noted that, in any event, attempt to apply state law in this case would be defeated by the following considerations: (1) There was no such claim presented below, and hence no such issue was preserved for presentation here. (2) If such an issue could now be presented here, this Court would remand the case to the court below for initial determination in accordance with state law or determine the matter itself pursuant to state law. (3) Under the law of the State of New York releases are allowable for the wrongful death of an employee (*Davis* v. *N. Y. Central*, 233 N. Y. 242), for injuries under the Workmen's Compensation Act (*O'Brien* v. *Lodi*, 246 N. Y. 41), and of claims under the deficiency judgment act (*City Bank Farmers Trust Co.* v. *McConnell*, 284 N. Y. 686). *Cf. New York Debtor and Creditor Law*, Sec. 243.

or overtime.[5] The decision below is erroneous for the following reasons:

(1) **Upon the face of the statute.**—The statute here involved does not specifically preclude a release upon voluntary restitution for the full amount of unpaid minimum wages or unpaid overtime compensation. Indeed, in the course of legislative consideration the measure was even

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[5] The decision below is in direct conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Guess* v. *Montague*, 140 F. 2d 500, 504 (1943) and the decision of the United States District Court for the Southern District of New York in *Gangi* v. *D. A. Shulte*, 53 F. Supp. 844 (1943). In these two cases there were, as in the instant case, a voluntary payment prior to the institution of suit of the full amount of overtime due if the Act applied (excluding liquidated damages or attorney's fees) and execution of a release by the employee. In *Fleming* v. *Post* (C. C. A. 2, decided December 14 or 15, 1944) a contrary result is reported but, as this brief goes to press, counsel have not had an opportunity to examine the opinion.

In *Fleming* v. *Warshawsky & Co.*, 123 F. 2d 622 (C. C. A. 7, 1941) the Wage and Hour Administrator had brought an injunction proceeding to force the payment of the amount of overtime due, a consent decree was entered but not honored, the Administrator brought contempt proceedings to force the agreed payments of overtime, and the defendants pleaded full releases; but, as there had been no payment of the full overtime due, the question was whether employees could release all rights, and liquidated damages and attorney's fees were not involved and could not be involved. In *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. 2d 359 (C. C. A. 10, 1943), cert. denied 320 U. S. 772, unlike the instant case, there was no release but liquidated damages and attorney's fees were allowed despite voluntary payment without suit. In *Rigopoulos* v. *Kerran*, 140 F. 2d 506 (C. C. A. 2, 1943)—which the Appellate Division below cited in its per curiam for the proposition that there was "no escape from the statutory language" (R. 65)—the court held that there was no evidence of an accord (p. 508). The payments had been forced by injunction proceedings instituted by the Administrator (47 F. Supp. 576). Similarly, in *Birbalas* v. *Cuneo Printing Industries*, 140 F. 2d 826 (C. C. A. 7, 1944), only after the institution of injunction proceedings by the Administrator, institution of suit by the employees, and entry of a consent decree in the Administrator's suit did the defendant make the overtime payments and take releases of "all liabilities, penalties, actions, or causes of action" under the Act; and the court, lamenting "the law's harshness" as compared with the general public policy favoring the settlement of controversies, doubted the correctness of *Guess* v. *Montague* and held that the statute conferred "a single and entire cause of action which can not be discharged or satisfied by paying merely part of it" (p. 828). In *Bergschneider* v. *Peabody Coal Co.*, 142

purged of a provision precluding agreed waivers of compliance.[6] Literally, the statute imposes double liability only for "unpaid" minimum wages or "unpaid" overtime compensation, and then only in an "equal" amount (Section 16(b)). It does not even say when such wages or overtime shall be paid,[7] although in other legislation of similar subject matter it has done so (Seamen's Act, 46 U. S. C. § 596). Yet the court below has made delay the condition of liability rather than failure of payment as the statute specifies. The Conference Report in which this section of the statute was explained states that an employee may recover liquidated damages only equal to "the amount by which the compensation *he should have received exceeds that which he actually received*" (83 Cong. Rec. 9255, emphasis supplied).

Moreover, the statute obviously contemplates that liquidated damages—in an amount equal to the "unpaid" mini-

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F. 2d 784 (C. C. A. 7, 1944), there was full payment of overtime without release but the court denied recovery of liquidated damages by the employee cost clerk who kept the records on the ground that, while he had been paid late, he had been paid promptly upon reporting his hours. In *Dize* v. *Maddrix*, 144 F. 2d 584 (C. C. A. 4, 1944), an employee bookkeeper received part of his unpaid compensation and overtime, gave a release in full, but was held entitled to full liquidated damages on the whole amount because the voluntary payment was as the parties knew less than the principal amount due. In *Atlantic Co.* v. *Broughton* (C. C. A. 5, decided December 4, 1944) the court sustained settlement waiving liquidated damages as to amounts of wages or overtime compensation paid.

[6] There was eliminated from the measure a provision stating that

> Sec. 20—(b) Any contract, agreement, understanding, condition, stipulation, or provision binding any person to waive compliance with any provision of this Act or with any regulation or order thereunder shall be null and void. (Senate Rep't No. 844, 75th Cong., 1st Sess., 1937.)

[7] Here the basic liability concerns overtime. Section 7 (a) simply requires the payment of overtime. The Administrator has recognized that, "depending on the circumstances," actual payment may be deferred for substantial periods (*Wage & Hour Manual* (1940), p. 120; (1941), p. 165). Here the overtime was voluntarily and fully paid, without request, promptly upon intimation of possible coverage.

mum wages or "unpaid" overtime compensation—shall be allowed only where employees are forced to litigate to recover such unpaid wages or unpaid overtime.[8] It does not literally confer a right to the liquidated damages where the base wage or overtime has *already* been paid, nor does it specifically establish an independent cause of action for liquidated damages *without* unpaid wages or overtime. Indeed, the liquidated damages were regarded as so secondary that Section 17 authorizing the Administrator to secure compliance through equity proceedings does not authorize decrees requiring the payment of such damages.[9] They are similarly omitted from the provision for criminal liability (Section 16(a)). Certainly these provisions do not preclude a release of liability for liquidated damages upon voluntary payment of unpaid wages or overtime. The purpose of the statute was to assure minimum

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[8] Section 16 (b) provides that the employer "shall be liable" for both overtime due and the liquidated damages, but the immediately following sentence plainly ties such double liability to "an action to recover such liability." The legislative history shows that Representative Keller, a member of the Conference Committee, stated that: "The employees can • • • maintain an action in any court to recover the *wages due* them and *in such a case* the Court shall allow liquidated damages in addition to the wages due *equal to such deficient payment* and shall also allow a reasonable attorney's fee and assess the court costs" (83 Cong. Rec. 9264, emphasis supplied). The provision, as he went on to say, was designed to minimize the cost of enforcement by the Government through placing in the hands of employees "the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the Act" (*id.*). The normal and reasonable reading of the provision is that action may be brought to recover unpaid overtime and, as an incident thereto, liquidated damages as well as attorney's fees and costs. The Administrator has so read it, and refers to the subdivision as one conferring a right of action for overtime "plus" damages, costs, and fees. (*Wage & Hour Manual* (1942), p. 729). The Conference Report assumes that liquidated damages may be recovered only where the employee has labored in excess of the maximum hours "without receiving the prescribed payment for overtime" (83 Cong. Rec. 9255).

[9] § 17 refers to § 15, which in turn refers only to §§ 6, 7, 11, and 14 entirely omitting § 16 (b) relating to liquidated damages, attorney's fees, and costs.

wages and overtime compensation (*Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 576-577; *Southland Co.* v. *Bayley*, 319 U. S. 4, 48; *Walling* v. *Helmerick & Payne, Inc.*, No. 27, decided November 6, 1944), not to pro-vide double compensation independently. There is no more reason to find independent liability for liquidated damages than to find it for attorneys' fees after even double liability has been paid voluntarily and in full.

Accordingly, in the absence of any dependable statutory guide or requirement to the contrary, the question must be determined upon general principles applied in the usual course of judicial proceedings.

(2) **On general principle.**—At least in the absence of provisions of Federal statutes to the contrary, the Federal courts in applying Federal law permit all manner of releases upon voluntary payment. Indeed, as this Court has said in an instance where there was no release but mere acceptance of payment—

> Decisions * * * by this court * * * show beyond all doubt that parties may adjust their own controversies in their own way, and that when they do so voluntarily, and with full knowledge of their rights and all the circumstances, no appeal lies to the courts to review their mutual decision. Courts cannot make contracts for parties; and if parties understandingly contract to adjust a controversy between them in a particular way, and actually execute the contract, they are both bound to regard the controversy as at an end. (*Savage* v. *United States*, 92 U. S. 382, 388-389.)

The same rule is reached where there is a settlement of claims and a formal release. *Chicago, Milwaukee & St. Ry. Co.* v. *Clark*, 178 U. S. 353; *Seminole Nation* v. *United States*, 316 U. S. 286, 290. There may be a settlement and release of compensation liability under the Federal Employers'

Liability Act. *Flynn* v. *N. Y., N. H. & H. R. Co.*, 283 U. S. 53 (per Holmes, J.); *Mellon* v. *Goodyear*, 277 U. S. 335. Seamen, traditionally regarded as the wards of admiralty, may release liability for personal injuries if—as here (R. 15-17, 42, 50)—it is done without coercion or deception. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 246-248; *The S. S. Standard*, 103 F. 2d 437 (C. C. A. 2, 1939). Multiple damages are provided in many situations under Federal law but, upon equitable principles, a release may be effective respecting treble damages under the Sherman Act. (*Radio Corp.* v. *Raytheon Co.*, 296 U. S. 459, 462-463) and a release will be honored notwithstanding the treble damage right accorded under the patent laws for infringement. *E. I. S. Mfg. Co.* v. *Supco Products Corporation*, 26 F. Supp. 758, 760-761 (S. D. N. Y. 1938).

Congress must be presumed to have legislated with this general state of the law in mind. *Cf. Hecht Co.* v. *Bowles*, 321 U. S. 321, 329; *Scripps-Howard Radio* v. *Comm'n*, 316 U. S. 4, 13 *et seq.* As stated in note 6 *supra*, the measure which became the Act here involved was purged of a provision against waivers. Congress has rarely disturbed the general law by legislating expressly upon the subject. Under the Seamen's Act it has required only that releases be executed before a shipping commissioner (46 U. S. C. §644) and has provided that "any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require" (*id.*, §597). *Cf. Garrett* v. *Moore-McCormack Co., supra*, p. 247; *The S. S. Standard, supra*, p. 439; *Cox* v. *Lykes Brothers*, 237 N. Y. 376 (per Cardozo, C. J.) In the Longshoremen's and Harbor Workers' Compensation Act, Congress prohibited waivers of compensation (33 U. S. C. §915(b)) except within limitations and upon official approval (*id.*, §908(i)).

That Section 16(b) of the statute here involved has been said to be "mandatory on the courts, regardless of the

good faith of the employer or the reasonableness of his attitude" (*Overnight Motor Co.* v. *Missel, supra,* pp. 581-582) does not mean that settlements by the parties are outlawed; for that was said in a case where there was neither payment nor release, and the employee was compelled to litigate his right to overtime. There this Court affirmed the same circuit court of appeals that decided *Guess* v. *Montague,* note 5, *supra,* contrary to the decision below in the instant case. See also *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, 602.

Neither the legal nature, legislative design, or public purpose of damage provisions requires them to be treated as so fixed and absolute that they may not be the subject of mutual and voluntary adjustment or waiver by the parties in the circumstances here presented. Since the purpose of double damage statutes is to secure adequate restitution (*United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 551-552), no reason appears why such a party may not accept full voluntary restitution and waive damages, fees, and costs at least where—as here—he has not been put to the necessity of making claims or litigating issues. Such statutory provisions have been held purely remedial (*Huntington* v. *Attrill,* 146 U. S. 657, 668 *et seq.; Helvering* v. *Mitchell,* 303 U. S. 391, 401; *Stockwell* v. *United States,* 13 Wall. 531, 551), so that the party for whose benefit they exist needs no special authority to waive them where the party liable voluntarily offers full restitution, renders exercise of the exceptional remedial rights unnecessary, and —as here—receives a freely given release of any further liability. Since multiple damages are designed to be remunerative and afford indemnity for loss (*Atchison etc. Ry.* v. *Nichols,* 264 U. S. 348, 352; *Stockwell* v. *United States, supra,* p. 547), no reason appears why the beneficiary may not waive the excess over a voluntary payment which makes him whole. Since liquidated damages are provided where

damages are difficult to measure and hence conjectural (*Overnight Motor Co.* v. *Missel, supra,* pp. 583-584; *Brady* v. *Daly,* 175 U. S. 148, 154; *Missouri Pacific Railway Co.* v. *Humes,* 115 U. S. 512, 522-523), the purpose of the law is more exactly met where the parties freely reach a settlement—at least where, as here, that settlement has been completely voluntary and leaves the party for whose protection the statute is designed with not less than he was entitled to in the first instance.

(3) **In good conscience and for good government.**—This Court has frequently stressed the lack of dependable guide for the coverage of the statute here involved. *Kirschbaum Co.* v. *Walling, supra,* p. 520; *Tennessee Coal Co.* v. *Muscoda Local, supra,* p. 597; *Walling* v. *Belo,* 316 U. S. 624, 634.[10] It is not a statute drawn in broad terms to guide an administrative agency in issuing specific regulations (*cf. United States* v. *Pennsylvania R. R. Co.,* 242 U. S. 208, 237-238) operative only for the future (*cf. Security Adm'r* v. *Quaker Oats Co.,* 318 U. S. 218, 228). It is instead a statute which, so the court below assumes, requires compliance upon pain of double liability without administrative specification of applicability. *Cf. Skidmore* v. *Swift and Company,* No. 12,

[10] The *Kirschbaum* case raised the possibility of coverage of service employees in a building where production for interstate commerce takes place, but of course it could not settle applicability to individual properties. Prior thereto the Appellate Division had held there was no coverage of building service employees (*Killingback* v. *Garment Center Capital, Inc.,* 259 App. Div. 691) and the Court of Appeals denied leave to appeal (248 N. Y. 818). See also *Pederson* v. *Fitzgerald Construction Co.,* 262 App. Div. 655, affirmed 288 N. Y. 687. The United States District Court for the Southern District of New York dismissed the companion of the *Kirschbaum* case instituted by the Administrator (*Fleming* v. *Arsenal Bldg. Corporation,* 38 F. Supp. 207 (1941)) and the Circuit Court of Appeals in reversing conceded that "so far the score is four to one against the view we take" (125 F. 2d 278, 281). See also *Cecil* v. *Gradison* (Ohio), 40 N. E. 2d 598 (1941); *Robinson* v. *Massachusetts Mutual Life* (Tenn.), 158 S. W. 2d 441 (1941).

decided December 4, 1944. Even if in this latter aspect the admittedly uncertain coverage of the statute does not render it violative of due process as petitioner has contended (R. 76) [11] or does not even require the statute to be construed to permit release of statutory damages upon voluntary payment in order to avoid questions of constitutionality (cf. *Lockerty* v. *Phillips*, 319 U. S. 182, 188; *Schneiderman* v. *United States*, 320 U. S. 118, 132), nevertheless the resulting application is harsh to the point that courts—including the Appellate Division in the instant case—have disclaimed responsibility for the result. Not only does the statute not require such a result but the familiar canon of construction requires courts to avoid such a result not inescapably required by the language of the statute.

Good government and the settlement of controversies require reversal of the judgment below. If, as the Administrator resolves disputed applications through equity pro-

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[11] Vaguely worded state antitrust acts have been held invalid. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216 (per Holmes, J.); *Collins* v. *Kentucky*, 234 U. S. 634 (per Hughes, J.); *American Machine Co.* v. *Kentucky*, 236 U. S. 660 (per McKenna, J.); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (per Taft, C. J.). The Food Control Act of 1917, applicable to "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," was held void with reference both to the penalties imposed (*United States* v. *Cohen Grocery Co.*, 255 U. S. 81) and the invalidation of contracts thereunder (*Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233, 237, 239-240). A state statute requiring contractors to pay their workmen not less than the "current rate of per diem wages in the localities where the work is performed" was held void for uncertainty. *Connally* v. *General Const. Co.*, 269 U. S. 385 (Holmes and Brandeis, JJ., concurring in the result). In holding invalid for uncertainty an Oklahoma statute prohibiting waste in the production of petroleum, this Court pointed out that "there is nothing to support defendants' suggestion that the regulatory provisions of the Act do not become operative until the commission has defined permissible production." *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 242-243.

ceedings or administrative investigation and settlements,[12] employers may assent only upon pain of double liability despite actual restitution, litigation will be prolonged and intensified. Independently of such official enforcement proceedings or adjustments, under such an interpretation no employer may make voluntary restitution without for most practical purposes admitting liability for equal damages as well and indeed the employer might thereby also place himself in jeopardy of Section 15 (a) (1) of the statute for-

[12] In this phase of the administration of the statute, both settlements and restitution have been accepted by the Administrator (First Annual Report, Wage and Hour Division, 1939, pp. 60-61; 1940, pp. 87, 90). An official form of receipt for unpaid wages or overtime is used in these cases reading as follows:

RECEIPT FOR UNPAID WAGES

As Computed or Approved by
The Wage and Hour Division
under
The Fair Labor Standards Act of 1938

Date .....

Received $ ..... from .....

located at .....

which amount represents unpaid wages computed or approved by the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938 and covering the period or periods of employment from ..... to .....

Signed .....
Address .....

U. S. Government Printing Office 16--112754

This practice is referred to in *Rigopoulos* v. *Kerran*, 140 F. 2d 506, 508 (C. C. A. 2, 1943). The Administrator has never announced in his interpretative bulletins, nor in individual cases are the parties found liable on investigation informed, that the payment of alleged due and unpaid compensation is a settlement of only half a claim. Should the Solicitor General file a brief as invited by the Court, the practice in this respect may well be elucidated.

bidding his product from moving in interstate commerce. Both employees and employers will thus be deterred from settling individual cases or from securing concessions of, or conceding, new applications of the statute. As the Circuit Court of Appeals for the Second Circuit has said in sustaining the validity of releases upon settlements of seamen's wages under the Seamen's Act: "It would make all settlements dangerous from the employer's standpoint and thus tend to force the seaman more regularly into the courts of admiralty." *The S. S. Standard*, *supra*, p. 439. The situation is even stronger here because the employee has received full voluntary compensation without claim or suit yet asks to be allowed to pocket the payment, repudiate a release freely and advisedly given, and litigate for double recovery without the expense of counsel fees. Certainly Congress could have intended neither to preclude releases of damages upon voluntary restitution nor to foster litigation for statutory damages where the principal had previously been paid in full. That anyone should profit from double liability where a release has been given in return for full voluntary restitution runs counter to accepted ideas of good conduct. "The assertion of this claim is sharp practice, offensive to every moral instinct, and assiduous search of the Statute fails to reveal anything which renders it fair or legal." *Gange v. D. A. Schulte*, *supra*, p. 846.

Such a result, where it has been attained, derives from judicial interpretation rather than the terms of the statute, for it draws "on some unexpressed spirit outside the bounds of the normal meaning of words." *Cf. Addison v. Holly Hill Co.*, 322 U. S. 607, 617. Even "a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable applica-

tion can be given to it, consistent with the legislative purpose." *United States* v. *Katz*, 271 U. S. 354, 357. Here an interpretation absolutely forbidding, under any circumstances, a settlement for less than 200% is unreasonable upon its face. It is required by neither the statute nor for the protection of employees. As the Circuit Court of Appeals for the Fourth Circuit has said, recognition of the right of the parties to settle liquidated damages upon payment of full voluntary restitution—

> will encourage employers to settle claims for unpaid minimum wages and overtime compensation, with assurance that when a full and fair settlement is made there will be no danger of further liability. On the other hand, it will preserve the threat of recovery of liquidated damages if full payment of minimum wages and overtime compensation, as required by the act, is not made. In other words, it will encourage compliance with the law and minimize the opportunity to take unjust advantage of its provision. (*Guess* v. *Montague*, *supra*, p. 505.)

The employee is deprived of nothing, for a settlement requires mutuality and a release requires volition.

It is respectfully submitted that the decision below should be reversed and remanded with instructions to enter a judgment of dismissal.

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December, 1944.